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AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association supports the contribution that the negotiated liberalization of international trade in goods and services, through government-to-government trade agreements, makes to the spread of the Rule of Law, both at the state-to-state level and within participants' domestic legal systems.

REPORT

This Report & Recommendation acknowledges the contribution that trade agreements make to the advancement of the Rule of Law ("ROL"). The U.S. Congress is periodically called upon to consider whether the United States should enter into various trade agreements, and whether to enact implementing legislation for trade agreements that have been negotiated. The ABA should be in a position to inform the Congress that these agreements help promote the ROL in the context of international economic relations.[1]

I. BACKGROUND

A. The ABA and the Rule of Law

The ABA has a long history of supporting efforts to strengthen and spread the ROL. However, ABA policy-making initiatives have not focused specifically on the contribution that trade agreements can make in advancing the ROL.

The ABA supported passage of U.S. legislation to implement the results of the Uruguay Round of multilateral trade negotiations. In doing so, the ABA took favorable note of the ROL-enhancing aspects of that multilateral package. R&R 1994.[2] The ABA has also endorsed the Trade Promotion Authority system by which the two political branches of the U.S. government cooperate in the negotiation and implementation of trade agreements, including regional and bilateral free trade agreements ("FTAs"). R&R 303B, 1997.[3] The ABA has not previously examined trade agreements through a ROL lens, however, and it has had no existing policy that would allow for commenting on the ROL-enhancing aspects of the many trade agreement implementing bills that have come before the Congress over the last 15 years.

B. The Working Group's Examination of FTAs

The Working Group focused on U.S. FTAs, choosing as specimens:

- the North American Free Trade Agreement ("NAFTA");

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[1] This report and recommendation reflect analysis conducted by a Working Group of the International Trade Committee of the ABA Section of International Law, which considered the specific question of whether free trade agreements contribute to the advancement of the ROL. Working Group members included Mélida Hodgson (Counsel, Miller & Chevalier Chartered), Welber Barral (Universidade Federal de Santa Catarina, Brazil), Daniel Vázquez Diaz (trade consultant, Inter-American Development Bank), and Valentin Povarchuk (Associate, McDermott, Will & Emery, Washington, DC). Julie Ann Laurance (Section of International Law International Trade Committee) advised the Working Group, and Ernesto Roessing (Universidade Federal de Santa Catarina) provided analytical assistance.

[2] *Available at* http://www.abanet.org/intlaw/policy/tradecustoms/uruguayroundapproval.pdf.

[3] *Available at* http://www.abanet.org/intlaw/policy/tradecustoms/fasttracknegotiating.pdf.

- the Central America and Dominican Republic-United States Free Trade Agreement ("CAFTA");
- the United States-Morocco Free Trade Agreement ("Morocco FTA"); and

- the United States-Australia Free Trade Agreement ("Australia FTA").

NAFTA was the first comprehensive U.S. FTA and has served as the model for U.S. FTAs negotiated subsequently. CAFTA is the latest incarnation of that model.[4] The pact with Morocco is significant because it was the first comprehensive U.S. FTA with a Middle Eastern country and set a foundation for the proposed Middle East Free Trade Agreement.[5] The Australia FTA is relevant as the latest U.S. FTA with a developed economy.

The ABA has defined the "Rule of Law" as "a system of transparent, predictable, understandable, and fair rules and institutions that facilitates the efficient and just functioning of societies."[6] From an economic perspective, the ROL is necessary for stable and predictable economic relations. At its core, the ROL is a non-discriminatory system of law upheld by strong due process guarantees. FTAs are generally consistent with these principles because they contain numerous non-discrimination provisions (national treatment and most-favored-nation treatment) and are designed to foster a stable and predictable framework for the exchange of goods and services between partners.

Academic works suggest that to achieve ROL principles, laws must be: general in scope, published or widely available, prospective in application (not retroactive), capable of being understood; non-contradictory, not beyond an individual's power to obey, relatively stable, enforced in accordance with their settled meaning and non-discriminatory.[7] In addition, laws must provide due process (fair, speedy resolution of disputes), and protect property rights. To analyze the potential contributions of FTAs to these principles, the Working Group identified seven analytical categories:

(1) Transparency in drafting laws and regulations;

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4 The labor and environmental chapters of this model were substantively revised pursuant to a May 10, 2007 agreement between the Bush Administration and the Democratic leadership of Congress, with new provisions included in United States-Peru Trade Promotion Agreement ("Peru FTA") that the Working Group also examined.

5 The FTAs with Israel (1985) and Jordan (2000) were also examined but were deemed less representative because of their somewhat narrower substantive coverage.

6 "Rule of Law: Questions and Answers," *available at* www.abanet.org/media/ceeli/rol_qa.pdf.

7 *See, e.g.*, Lon Fuller, *The Internal Morality of Law*, *in* ANALYTIC JURISPRUDENCE ANTHOLOGY 83 (Anthony D'Amato, ed., 2003); James W. Torke, *What Is This Thing Called the Rule of Law?*, 34 IND. L REV. 1445 (2001); Sandra B. Burman & Barbara E. Harrell-Bond, eds, THE IMPOSITION OF LAW (1981); Francis Snyder, *Economic Globalization and the Law in the Twenty-first Century*, 624-640 in THE BLACKWELL COMPANION TO LAW AND SOCIETY (Austin Sarat, ed. 2004); Marise Cremona, *Regional Integration and the Rule of Law: Some Issues and Options* in BRIDGES FOR DEVELOPMENT: POLICIES AND INSTITUTIONS FOR TRADE AND INTEGRATION 137-157 (Robert Devlin and Antoni Estevadeordal, eds., Inter-American Development Bank 2004).

(2) Transparency in enacting laws and regulations;

(3) Transparency in applying laws and regulations;

(4) Regulatory Strengthening;

(5) Judicial Strengthening;

(6) Institutional Strengthening; and

(7) Protection of property rights.

The Working Group found these categories to be sufficiently representative of the ROL principle while being "user friendly" enough to allow coherent and meaningful review.

The Working Group did not seek to prove the existence of the ROL in countries that have signed FTAs with the United States. Similarly, it did not attempt to document whether, after the implementation of FTAs, changes occur domestically in FTA partners that evidence comprehensive respect for the ROL (extending, for example, beyond the international economic issues covered by the FTA).[8] Rather, the Working Group looked for, and found in the FTAs, elements corresponding to the seven ROL criteria identified above. The Working Group concluded that efforts by countries to reform their domestic laws to meet FTA requirements, sometimes as early as during the negotiation stage, highlight the ability and tendency of FTAs to spread and strengthen the ROL. Other studies have reached similar conclusions.[9]

C. The Political Context -- What This Recommendation Is (and Is Not)

Trade liberalization is controversial, and achieving trade liberalization through FTAs is highly controversial. This recommendation is not an endorsement of trade liberalization. It is a statement that negotiated liberalization effectuated through trade agreements tends to foster the development of the ROL and is, on that account, a good thing. If approved, the recommendation will enable the ABA to comment on future trade agreements, in a limited fashion. The economic merits of a trade agreement fall outside the core competence of a bar association, but the ABA will be able to draw favorable attention to ROL-enhancing aspects of trade agreements.

Many human rights advocates would like to see much greater ROL advances and additional leverage—including denial of favorable trade relationships—brought to bear in situations of human rights deprivation. The policy issues raised by such advocates fall outside the scope of this recommendation. The recommendation does not assert that the ROL benefits of trade agreements are broad or deep enough to address issues such as human rights deprivation. It

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[8] When submitting an FTA to the Congress for approval, the Executive Branch must certify that the trading partner has the legal capacity to implement the FTA. In the past, this process has been delayed when a U.S. administration has insisted that there be changes (for example, to Intellectual Property Rights laws) *before* submitting the FTA for Congressional approval.

[9] *See, e.g.*, Michael J. Ferrantino, *Policy Anchors: Do Free Trade Agreements and WTO Accessions Serve as Vehicles for Developing-Country Policy Reform?* 2 OFFICE OF ECONOMICS WORKING PAPER, U.S. INTERNATIONAL TRADE COMMISSION (April 2006).

simply asserts that trade agreements tend to advance the ROL -- both domestically within the individual parties, and at the state-to-state level, as described below. The premise is that the ABA can comfortably support, and cannot logically oppose, partial ROL advances.

There is debate in the trade and development community as to whether trade agreements are capable of advancing, and likely to advance, the ROL within developing countries. Analysis of multiple agreements, including agreements with developing countries, indicates that the ABA should support the pursuit and ratification of ROL-enhancing trade agreements.

II. ANALYSIS -- REGIONAL/BILATERAL FREE TRADE AGREEMENTS

A core principle of trade liberalization, under FTAs and otherwise, is non-discrimination. Non-discrimination provisions—national treatment and most-favored-nation treatment specifically—are widely regarded as the trading system's foundation. These principles, as well as transparency provisions, appear in the FTAs negotiated by the United States.

U.S. FTAs generally cover key sectors based on traditional WTO commitments: market access for goods, agriculture, customs, non-tariff barriers (including sanitary and phytosanitary measures), and trade remedies. They also seek significant coverage of sectors that are not very liberalized in the WTO, such as investment, services, intellectual property rights, telecommunications and e-commerce, and government procurement. In addition, U.S. FTAs contain disciplines in areas that are largely outside WTO rules, such as labor, environment, and competition policy.[10] FTAs also include administrative and dispute settlement provisions.

The chapters in the U.S. FTA "model" that display the most comprehensive coverage of the ROL categories of analysis are the chapters on Customs Administration and Trade Facilitation, Government Procurement, Investment, Financial Services, Telecommunications, Intellectual Property Rights, Labor, Environment, Transparency, and Dispute Settlement. Accordingly, the analysis below focuses on these chapters. It also touches on the expansion of the administration chapter in the CAFTA, to include provisions on trade capacity building.

A. Transparency in the Drafting, Enacting and Application of Laws and Regulations

Transparency in the drafting of laws and regulations is achieved when legislative proposals, as well as their rationale and objectives, are published. In addition, there should be a process to allow the public to comment on the proposals—a key feature of what we in the United States understand as "notice and comment." Transparency in the enactment of laws and regulations requires a predictable process, and transparency in the application of laws and regulations requires predictable and known procedures post-legislation, a predictable review mechanism, known institutional enforcement entities, and publication and easy access of the laws and regulations. Most FTAs have a Transparency Chapter that contains as key features:

[10] Of the post-NAFTA FTAs, only Australia, Chile, Peru, and Singapore cover competition policy.

(1) advance publication of proposed legislation and the opportunity for the public to comment (*e.g.* CAFTA Art. 18.2);

(2) reasonable notice to affected parties of administrative proceedings, including details on what information the notice should contain (*e.g.* CAFTA Art. 18.4); and

(3) judicial/administrative review of administrative actions regarding matters covered by the FTAs (*e.g.* CAFTA Art. 18.5).

These principles are repeated in chapters throughout the FTAs selected for examination. For example, the National Treatment and Market Access for Goods (CAFTA Chapter 3), Customs Administration and Trade Facilitation (CAFTA Chapter 5), Technical Barriers to Trade (CAFTA Chapter 7), and Government Procurement (CAFTA Chapter 9) chapters all include additional requirements reinforcing the obligation to publish proposed and existing laws and regulations. In addition, chapters that address regulatory functions, such as Trade Remedies, Government Procurement, Services, Financial Services, Telecommunications, Intellectual Property Rights (IPR), Labor, and Environment, all require that the Parties make administrative procedures and rulings available (including findings). Moreover, there are special procedural transparency requirements in the Investment Chapter for investor-state proceedings.[11] An important element of these provisions is that they are often accompanied by deadlines that ensure that the substantive obligation is not undermined by delays.

B. Regulatory Strengthening

Regulatory strengthening in an international agreement encompasses the subscription and incorporation into the domestic legal system of international norms and conventions, treaties and agreements, and the development of new types of legal contractual structures considered optimal for the international exchange of goods and services. This incorporation should result in a more transparent, predictable, and efficient regulatory regime. In the Customs Administration and Trade Facilitation chapters of the FTAs, one can find commitments to provide technical assistance to improve substantive administrative tasks, advance the technical skills of personnel, and simplify and expedite customs procedures, all with the ultimate goal of improving compliance with laws and regulations governing importations.[12]

The Intellectual Property Rights chapters require parties to join various international agreements governing copyright, patents, and trademarks on certain dates, including before or upon entry into force of the FTA.[13] These chapters also require a system for registering trademarks that includes rules governing the application, registration, and maintenance of trademarks; written notice of decisions; and the opportunity to challenge regulatory decisions.[14]

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[11] *E.g.* CAFTA Arts. 10.16 and 10.21.

[12] *E.g.*, CAFTA Art. 5.5.8.

[13] *E.g.*, CAFTA Art.15.1.

[14] *E.g.* CAFTA Art. 15.2.

Although critics have described the Labor chapter as lacking substance, as discussed below, one of its important features is to provide a cooperation and capacity building mechanism with the goal of improving labor standards and compliance with the principles of various international conventions.[15] Also included are mechanisms to address concerns related to trade capacity building[16] and provisions for cooperation and joint institution-building activities.[17]

C. Judicial Strengthening

Judicial strengthening focuses the training of judges, capacity building of courts, and the development of specialized judicial structures. U.S. free trade agreements mandate the creation of specialized courts in various contexts in order to guarantee non-discrimination and due process. The Customs Administration and Trade Facilitation chapter establishes that importers must have access to administrative review independent of the office that issues a determination and to judicial review.[18] Other chapters of the free trade agreements repeat this key concept.

The Government Procurement chapter has detailed procedures to ensure that a supplier of goods or services is not unfairly denied a government contract and left without a remedy while challenging an award. The chapter mandates the creation of "an impartial administrative or judicial authority," independent of the procuring entity, to review a supplier's challenge. The impartial authority must have the authority to take interim measures such as suspending an award. The concept of a "bid protest" procedure—a procedure that suspends the award pending the protest—is not one that was universal to U.S. FTA partners. CAFTA includes transition periods to allow parties to adapt their administrative and judicial systems to this obligation.

In the Intellectual Property Rights chapter, specialized judicial structures empower existing judicial bodies to order provisional measures, such as seizure and destruction of pirated or counterfeited goods, and the implements used to manufacture them.[19]

D. Strengthening Institutions

Institutional strengthening includes the creation of new types of legal institutions. The chapter on Sanitary and Phytosanitary Measures directs that shortly after an FTA enters into force, a Committee on Sanitary and Phytosanitary Matters be established to address bilateral issues and enhance understanding of the parties' laws and regulations respecting sanitary and

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[15] *E.g.* CAFTA Art. 16.5.

[16] *E.g.* CAFTA Art. 19.4.

[17] *See, e.g.*, U.S.-Morocco Arts. 6.5.7 and 16.5.

[18] *E.g.* CAFTA Art. 5.8.

[19] *E.g.* CAFTA Arts. 15.11.8-11.26.

phytosanitary issues.[20] This type of exchange can lead to strengthening domestic policy and regulations. A number of other committees are created in the free trade agreements.[21]

A key feature of the CAFTA, and the pending free trade agreements (with the exception of the United States-Korea FTA), is the establishment of a Committee on Trade Capacity Building which, among other things, will train officials of U.S. trading partners on the various subjects covered by the free trade agreements.[22] In addition, subject-specific cooperative bodies, which often coordinate their activities with the overall Committee on Trade Capacity Building, are established in several substantive FTA chapters: the Committee on Agricultural Trade (CAFTA Art. 3.19), Committee on Sanitary and Phytosanitary Matters (CAFTA Art. 6.3), Committee on Technical Barriers to Trade (CAFTA Art. 7.8), Labor Affairs Council (CAFTA Arts. 16.4, 16.5, and Annex 16.5), and Environmental Affairs Council (CAFTA Art. 17.5) Other chapters provide for cooperation through the Committee on Trade Capacity Building.[23]

Another feature of the U.S. free trade agreements that arguably strengthens institutions is the inclusion of anti-corruption provisions in the Transparency (*e.g.* CAFTA Art. 18.8) and Government Procurement (*e.g.* CAFTA Art. 9.13) chapters. The latter provision requires procedures that would indefinitely bar a supplier that has engaged in fraud or attempted to bribe procurement officials from participating in procurements. In addition, the Telecommunications chapter requires the establishment of regulators independent from, and not accountable to, suppliers of public telecommunications services.[24]

E. Protection of Private Property Rights

The protection of property rights provisions appears in the Investment and Intellectual Property Rights chapters. A central provision of investment chapters is the obligation of states to promptly compensate, at fair market value, for an expropriation. Moreover, expropriations must be for a public purpose and effected in a non-discriminatory manner.[25] This obligation exists even in war or similar situations where the state or its forces requisition private property or unnecessarily destroy private property.[26]

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[20] *See* CAFTA 6.3.1, 6.3.6, and Annex 6.3.

[21] *See, e.g.,* Committee on Technical Barriers to Trade (CAFTA Art. 7.8.1 and Annex 7.8), Committee on Agricultural Trade (CAFTA Art. 3.19), a Committee on Trade in Goods (CAFTA Art. 3.30.1), and the Committee on Financial Services (CAFTA Art. 12.16).

[22] *See* CAFTA Art. 19.4

[23] *See* CAFTA Art. 15.12 (Customs) and Art. 15.1.16 (Intellectual Property).

[24] *E.g.* CAFTA Art. 13.7 and Annex 13.IV.2.

[25] *E.g.* CAFTA Art. 10.7.

[26] *E.g.* CAFTA Art. 10.6.

The Intellectual Property Rights chapter is replete with obligations that protect and enforce rights holders' exclusive rights. The general framework is built around protecting copyrights, patents, and trademarks, and variations in provisions reflect the different ways in which the exclusive right can be violated and protected. For example, patent owners can prevent the importation of infringing products.[27] Parties must also ensure that they have judicial procedures to enforce intellectual property rights.[28] The IPR chapter even requires parties to criminalize certain rights violations, such as the manufacture, sale, import, or lease of equipment that unlawfully decodes encrypted programs.[29]

F. Labor and Environment: The May 10, 2007 Compromise

Even before the May 10, 2007 compromise, the Labor and Environment chapters contained provisions with significant potential to promote ROL development in partner countries. In fact, almost every provision of the Labor chapter of CAFTA (Chapter 17) and most provisions of the Environment chapter (Chapter 18) exhibit one or more of the seven ROL categories. For example, the CAFTA Labor chapter contributes to:

- *institutional strengthening* -- by reaffirming the Parties' obligations to respect international labor norms, and by providing institutional arrangements for inter-Party cooperation in fulfilling the objectives of the chapter[30];

- *strengthening of regulatory institutions* -- by obligating Parties to enforce their labor laws[31]; and

- *judicial strengthening and transparency in the application of laws* -- by requiring Parties to provide interested persons with recourse to open, impartial tribunals consistent with due process of law,[32] and by supplying procedures for inter-Party consultations and dispute resolution.[33]

The CAFTA Environment chapter has similar ROL-enhancing characteristics. It contributes to:

- *regulatory strengthening* -- by requiring parties to enforce their environmental laws;[34]

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[27] *E.g.* Morocco Art. 15.9.4.

[28] *E.g.* Morocco Art. 15.11.5.

[29] *See* NAFTA Art. 1707.

[30] *See* CAFTA Arts. 16.1, 16.4 & 16.5.

[31] *See* CAFTA Art. 16.2

[32] *See* CAFTA Art. 16.3

[33] *See* CAFTA Arts. 16.6 & 16.7.

[34] *See* CAFTA Art. 17.2.

- *judicial strengthening and transparency in the application of laws* -- by requiring the Parties to ensure fair, equitable, transparent environmental enforcement proceedings, and provide interested parties with remedies for violations[35];

- *institutional and regulatory strengthening and transparency* -- by creating bodies to address the issues covered by the chapter and foster inter-Party cooperation[36]; and

- *judicial strengthening* -- by providing procedures for inter-Party consultations and dispute resolution,[37] as well as direct recourse by citizens to international enforcement procedures.[38]

Critics of the labor and environment provisions in the pre-Peru FTAs complained that obligations were "soft" obligations that were difficult to enforce. For example, the non-derogation provisions of the Labor and Environment chapters stated that "each Party *shall strive to ensure* that it does not waive or otherwise derogate from . . . [its relevant laws]."[39] The pre-Peru FTAs were also criticized for failing to provide a means of enforcing widely-accepted international norms on labor and environment.

Changes to the Labor and Environment chapters resulting from the May 2007 compromise addressed some of these concerns and increased the FTAs' potential to promote ROL development in partner countries. This improvement is more significant in the Labor chapter, which added protections for certain substantive human rights. The Peru FTA now includes a binding obligation to adopt and maintain laws and regulations protecting the five basic labor rights outlined in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1988)*: freedom of association; the effective recognition of the right to collective bargaining; the elimination of all forms of compulsory or forced labor; the effective abolition of child labor and a prohibition on the worst forms of child labor; and the elimination of discrimination in employment and occupation.[40]

Further, the Parties now have a more enforceable "hard" non-derogation obligation: "Neither Party *shall waive or otherwise derogate* from . . . [relevant laws]."[41] In addition, institutional strengthening is reinforced by the elaboration of the duties of the Labor Affairs Council and creation of labor ministry contact points with specified duties.[42]

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[35] *See* CAFTA Art. 17.3

[36] *See* CAFTA Arts. 17.5, 17.6 & 17.9.

[37] *See* CAFTA Arts. 17.10 & 17.11.

[38] CAFTA Arts. 17.7, 17.8.

[39] CAFTA Arts. 16.2.2, 17.2.2.

[40] *See* Peru Art. 17.2.1.

[41] Peru Art. 17.2.2.

[42] *See* Peru Art. 17.5.2 and 17.5.5.

Revisions to the Environment chapter may also bolster the chapter's ROL-enhancing capability. As in the Labor chapter, there is now a firmly enforceable non-derogation commitment.[43] The new Environment chapter may also strengthen institutions by requiring Parties to adopt, maintain, and implement a set of multinational environmental agreements.[44] Additional requirements that Parties promote public awareness of their environmental laws further reflect the "transparency in application of laws" principle.[45] ROL-enhancement under the judicial strengthening heading is improved with provisions that require consultations and dispute resolution regarding compliance with multinational environmental agreements to defer to "interpretive guidance on the issue under the agreement."[46] Finally, the new Annex on Forest Sector Governance in the U.S.-Peru FTA (Annex 18.3.4), improves the ROL-enhancing potential of the regulatory and institutional strengthening categories of analysis.

G. ROL at the State-to-State Level

As detailed above, negotiating and implementing U.S.-style FTAs tends to lead the participating governments to act in ways that bolster the ROL domestically. Such agreements also expand the scope of ROL internationally by increasing government-to-government obligations. For example, on the U.S. side, favorable trade treatment that has been extended unilaterally (under a preference program) can be enshrined in an agreement and acquire a more stable, hard-to-reverse, character. Moreover, FTAs typically set out dispute settlement mechanisms for resolving differences over agreement interpretation, "judicializing" the handling of disputes that would otherwise be addressed in a primarily political fashion. These also count among the ROL-enhancing aspects of FTA-based trade liberalization.

III. ANALYSIS -- MULTILATERAL TRADE AGREEMENTS

Multilateral trade agreements also advance the ROL, at both the state-to-state and national levels. At the state-to-state level, past multilateral agreements have thickened the web of substantive international obligations -- binding market access opportunities that had once been applied by states voluntarily into scheduled commitments, and codifying rules to reinforce and supplement those scheduled commitments. In addition, the movement from a largely political/diplomatic to a more adjudicatory system for settling disputes that arise under multilateral trade agreements has been, as the ABA has previously recognized, a significant ROL advance. *See* R&R 1994 at 2, 6. As for ROL promotion at the national level, past multilateral agreements have included *transparency* obligations applicable to the development and publication of various sorts of regulations; have obligated signatories to provide for *judicial review* of various types of administrative determinations; and have otherwise contained many of

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[43] Peru Art. 18.3.2 ("a Party *shall not* waive or otherwise derogate from . . . [relevant environmental laws]").

[44] *See Peru* Art. 18.2.

[45] *See* Peru Art. 18.7.

[46] Peru Art. 18.12.5(b)(ii) & 18.12.8(b).

the pro-ROL provisions found in FTAs (as summarized in Section II above), among their ROL-positive features.

IV. CONCLUSION

The seven ROL principles used here as analytical categories are found repeatedly in various chapters of trade agreements, supporting a conclusion that trade liberalization through the negotiation and implementation of trade agreements is in principle ROL-favorable. The actual "ROL gain" in each case and in the aggregate depends on how (and how rapidly) these principles are operationalized. Aggressive reform, to strengthen the regulatory, judicial, and institutional regimes of trade agreement parties, is an essential component.

Trade agreements can initiate or facilitate such reform. U.S.-style FTAs contain obligations that can further the development of the ROL, and tools to help implement these obligations. CAFTA, for example, contains transition provisions and trade capacity building provisions that, in themselves, promote the ROL. U.S.-style FTAs also create committees to assist in the development of regulations and procedures, again furthering ROL development.

Trade agreements are, of course, economic agreements, not pursued or entered into for the primary purpose of advancing the ROL. Indeed, from some trading partners, such an objective could lead to charges of interference with domestic affairs. Nevertheless, through these agreements the concept of the ROL is introduced or strengthened. Some U.S. trading partners that may be unfamiliar with or hostile to transparency and other ROL principles can accept them through a treaty process like an FTA negotiation. Indeed, trade agreements sometimes provide helpful "cover" for reforming governments.

The ABA should adopt a policy that will enable its representatives to speak out in support of trade agreements as vehicles for strengthening the development of the ROL.

Respectfully Submitted,

Jeffrey Golden, Chair, Section of International Law

August 2008

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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Jeffrey B. Golden, Chair
Section of International Law

1. Summary of Recommendation.

   The recommendation endorses the liberalization of international trade in goods and services, through negotiating and implementing government-to-government trade agreements, as a factor contributing to the spread of the rule of law.

2. Approval of Submitting Entity.

   This Recommendation was approved by the Council of the Section of International Law at its meeting on April 5, 2008 in New York.

3. Has this or a similar recommendation been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

   No existing policies would be affected by approval of this Recommendation. The ABA did endorse one prior trade agreement, the agreement concluding the Uruguay Round of multilateral trade negotiations, in part on the basis of its contribution to the Rule of Law.

5. What urgency exists which requires action at this meeting of the House?

   This is a policy statement that will enable the ABA to comment on ROL-related aspects of future trade agreements that come before the U.S. Congress for implementation.

6. Status of Legislation.

   Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

   None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

This recommendation and report will be referred to all ABA entities.

10. Contact Person. (Prior to the meeting.)

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EXECUTIVE SUMMARY

(a) Summary of the Recommendation.

The recommendation supports the negotiated liberalization of international trade in goods and services as a factor contributing to the spread of the rule of law in international economic relations.

(b) Summary of the issue(s) which the recommendation addresses.

The negotiation and implementation of government-to-government agreements liberalizing international trade in goods and services helps promote the rule of law in the context of international economic relations.

(c) How the proposed policy position will address the issue.

The proposed policy position will enable the ABA to speak up supportively, on rule of law grounds, when future trade agreements come before the U.S. Congress for implementation.

(d) Summary of any minority views of opposition which have been identified:

None identified.